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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. CAIN,

Petitioner,

vs.

MEDTRONIC, INC.,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

There are no questions of sufficient significance to require the granting of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

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OPINIONS BELOW

The opinions below are accurately described in the petition, except that the Seventh Circuit opinion is reported at 689 F. 2d 645.

STATEMENT OF FACTS

There are numerous places were petitioner's[1] statement of facts becomes difficult to square with the record below. Rather than go through them one by one, whether respondent deems the statement relevant here or not, respondent will make a brief statement of its own.

Petitioner Cain, and two of his fellow sales representatives with Medtronic, all left Medtronic at about the same time to become sales representatives for a major competitor of Medtronic, Intermedics, Inc. Suits were filed and consolidated against the three sales representatives to enforce the identical restrictive covenant clauses in their contracts. The district court entered an injunction enforcing the contracts on February 4, 1982, and the Seventh Circuit Court of Appeals affirmed on July 13, 1982. Requests were made prior to trial and after trial of the district court, and on several occasions to the Seventh Circuit, by petitioner to be permitted to attend surgeries with his old customers when specifically requested by doctors. On all occasions except one (by the Seventh Circuit, for a two week period only and prior to entry of the final injunction by the district court), these requests were denied.[2]

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[1] The caption refers to "petitioners" but the only petitioner here is Cain. Benda petitioned separately on different issues and Conde has no petition pending.

[2] There is no purpose to such an order other than the diversion of Medtronic business. Petitioner confirms this in that when the Seventh Circuit entered the one temporary order permitting surgery attendance (when it was specifically requested by an old customer-physician), petitioner himself took the initiative to call his old customers and inform them that they had merely to contact him and he would be able to assist at any surgery, emergency or otherwise. And they did so.

Petitioner has conceded in his petition here, contrary to arguments which were made below, that virtually every surgery attended by a sales representative is accompanied by a sale of that sales representative's product. Therefore, the ability to attend a surgery of an old customer-physician is an assurance of an Intermedics product sale. Indeed, of all of the surgery-attendance violations of the restrictive covenants testified to in the district court, all but one involved an Intermedics implant.

This proves the wisdom and purpose of the restrictive covenant clauses. A relationship of trust and confidence is built between a sales representative, extensively trained by Medtronic, as petitioner now concedes, and his physician-customer, to the point where the doctor may switch products merely to continue to deal with the same sales representative. This encourages companies like Intermedics, which does not have extensive training, to buy a market share simply by hiring away Medtronic sales representatives.[3] The restrictive covenant clause, preventing a sales representative from dealing with customers he has dealt with in the prior year, for 360 days, permits Medtronic to replace its old sales representative with a new one, train the new sales representative, and give that sales representative a little breathing space to develop his own relationship with customer-physicians without interference from the prior sales representative. And the clause achieves this equity without preventing the former sales representative from earning his living in the same field and same general geographic area.

Contrary to petitioner's argument, a physician deprived temporarily of the services of petitioner is not deprived of

[3] And there is no risk for the sales representative. Petitioner, Benda and Conde are each guaranteed, for the first two years, an annual salary of $100,000 whether they sell a single pacemaker or not, a car allowance of $600 per month, expenses and a bonus upon the sale of their first 10 pacemakers, in addition to reimbursement for all legal expenses incurred in any litigation with Medtronic.

competent technical help. In addition to hospital technicians, many of whom are qualified to do the kind of measurements a sales representative can do, there are the services of the other two former Medtronic, now Intermedics, sales representatives who left at the same time as petitioner, and who petitioner concedes are in every respect as capable, trained and knowledgeable as petitioner, and who are available on a full time basis. In addition there are skilled sales representatives of Medtronics available as well as those of other manufacturers. Dr. Kehoe, called as a witness by petitioner, specifically refused to say that the quality of patient care would suffer if he did not have a particular sales representative. All he would say is that his life would be "easier" if he were dealing with someone he was used to.

It is true that in October of 1982 Medtronic filed a motion in the district court for leave to file an amended and supplemental complaint. Leave was granted on December 28, 1982 insofar as Medtronic seeks damages for violations of agreements or court orders from the date of filing of the initial complaints to the expiration of the injunctions. The pending contempt proceeding against this petitioner will be subsumed in the damage claim for violations of orders and agreements during the pendency of the effective dates of those orders or agreements.

ARGUMENT

The sole basis for petitioner asking this Court to grant a writ of certiorari under Supreme Court Rule 19, is that the case presents a question of federal law which has not been, but should be, decided by this Court. The sole authority for the finding of a "federal" question is the old Latin adage, *ipse dixit.*

The first question presented, whether it is contrary to public policy to enforce a restrictive covenant clause in a private, commercial contract between an employer and its sales representative, is clearly not a federal question.[4] The clause prohibits the sales representative from diverting business by soliciting, contacting or communicating with customers with whom the sales representative did business in the 360 days preceding his termination of employment. It is not here argued that the restrictive covenant clause is in any respect unreasonable except in that it has the side effect of preventing a sales representative, for 360 days, from assisting former customer-physicians in implant surgeries, each of which, petitioner concedes, would result in a sale of an Intermedics product to that physician, thus completely nullifying any effect the restrictive covenant clause might have.

The second "related" question suggested by petitioner is whether the restriction on the sales representative, because of its indirect effect on the ability of his old customer-physicians to use his services for a limited period of time, raises a constitutional question on behalf of physicians (and therefore their patients), through the back door as it were. Petitioner suggests that the restriction violates a physician's rights under the Fifth and Ninth Amendments to the United States Constitution to administer medical care to his patients in accordance with his best judgment, citing *Doe* v. *Bolton,* 410 U. S. 179 (1973).

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[4] It should be noted here that for public policy reasons medical emergencies were explicitly exempted from the terms of the district court's injunction enforcing the employee agreement.

Roe v. *Wade*, 410 U. S. 113 (1973) and *Doe* v. *Bolton*, *supra*, enforced rights under the Fourteenth Amendment to the United States Constitution against state action infringing those rights. Here there is no state action and no Fourteenth Amendment right.

That a physician's complete freedom to have a particular person as a technician in implant surgery is in some small way restricted does not raise this to a violation of anyone's Fifth or Ninth Amendment rights, even assuming the petitioner has standing to raise the rights of physicians and their patients. Would a union contract with the hospital which had the effect of restricting the availability of nurses or other technical personnel become a federal matter because it left the doctor without complete freedom as to who would be available to him when? Or would his lease of office space become a federal matter because it required the building to be at a particular temperature which the doctor thought not in the best interests of his patients?

Quite apart from the fact that there is no federal question, there is really no great public health issue either. The unavailability of one sales representative will not have an effect on a physician's determination to implant or not to implant, or in dealing with his patient. One's choice of a technical assistant is hardly on the level of the concerns in *Doe* v. *Bolton*, *supra*, or *American Medical Association* v. *Weinberger*, 522 F. 2d 921 (7th Cir. 1975), which involved a challenge to HEW regulations which would require immediate review of a physician's decision to hospitalize a patient. Both of those cases deal with direct restraints on a physician's medical judgments. This is not the case here.

Moreover, contrary to petitioner's claim, his "public health" argument has been routinely rejected by other courts enforcing similar agreements in similar circumstances. In *Medtronic, Inc.* v. *Gibbons*, 527 F. Supp. 1085 (D. Minn. 1981), the district court rejected an identical argument (it is difficult to see how this case is inapplicable merely because the parties

submitted it on pleadings, affidavits and depositions, rather than after a trial). It said:

> Gibbons [the salesman] argues that the public interest of making sure that all patients receive the best medical care available would be seriously hampered by restraining Gibbons. *He would be limited in assisting doctors in implantations of pacemakers* and from giving seminars to nurses and other hospital personnel. Although Gibbons does perform some beneficial public services by taking part in surgeries and giving seminars, he is primarily a salesman, not a doctor or an educator. His activities contribute to improving the quality of health care, but his temporary absence from a portion of his sales area would not seriously deteriorate the quality of health care in that area. 527 F. Supp. at 1095.

Moreover the case law is clear that an otherwise valid employment agreement is enforceable even if its restrictions are directly imposed on doctors themselves. See, *e.g.*, *Canfield* v. *Spear*, 44 Ill. 2d 49, 254 N. E. 2d 433 (1969) (doctor not permitted to practice in 25 mile radius of Rockford for 3 years); *Cockerill* v. *Wilson*, 51 Ill. 2d 179, 281 N. E. 2d 648 (1972) (veterinarian not permitted to practice in 20 mile radius of Rushville for 5 years).

CONCLUSION

The Petition for a Writ of Certiorari to the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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